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Kathryn Smith
kathryn.smith.4@bc.edu

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HEY! THAT'S MY VALOR: THE STOLEN VALOR ACT AND GOVERNMENT REGULATION OF FALSE SPEECH UNDER THE FIRST AMENDMENT

Abstract: The Stolen Valor Act criminalizes lies about receiving military decorations. Through the Stolen Valor Act, the government seeks to protect the honor associated with receiving a military decoration from people who falsely claim to have received one. Some courts have held that the false statements proscribed by the Stolen Valor Act fall outside of First Amendment protection. Other courts, most notably the U.S. Court of Appeals for the Ninth Circuit, in the 2010 decision *United States v. Alvarez*, held that lies about military decorations are protected speech and that the Stolen Valor Act is unconstitutional because it does not meet strict scrutiny. This Note argues that the First Amendment protects false statements. Section 704(b) of the Stolen Valor Act does not fall into any category of unprotected speech, does not meet the strict scrutiny test for government regulation of protected speech, and therefore is an unconstitutional restriction of protected speech.

INTRODUCTION

On July 23, 2007, at a meeting of the Three Valley Water District Board of Directors in suburban Los Angeles, newly elected director Xavier Alvarez introduced himself: “I’m a retired Marine of twenty-five years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I’m still around.”¹ Apart from the last sentence, Alvarez’s introduction was a series of lies.² Alvarez never served a day in any branch of the U.S.

¹ *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210). The Congressional Medal of Honor is the highest award for valor in action against an enemy force. *The Medal of Honor*, CONG. MEDAL OF HONOR SOC’Y, <http://www.cmohs.org> (last visited Mar. 12, 2012). The Congressional Medal of Honor is generally presented by the President of the United States of America in the name of Congress to individuals serving in the armed services of the United States. *Id.* The first Medal of Honor was presented March 25, 1863 to Private Jacob Parrott and there have been 3454 Congressional Medal of Honor recipients since. *Archive Statistics*, CONG. MEDAL OF HONOR SOC’Y, <http://www.cmohs.org/medal-statistics.php> (last visited Mar. 12, 2012). Only eighty-five Congressional Medal of Honor recipients are still alive. *Id.*

² *Alvarez*, 617 F.3d at 1201.

armed forces and certainly was never awarded the Congressional Medal of Honor.³

Even prior to Alvarez's lies at the water district meeting, he was known for his tall tales.⁴ In addition to lying about military service and decorations, Alvarez had claimed to be a professional hockey player, a former police officer, and the former husband of a Mexican starlet.⁵ The district court observed that Alvarez seemed to live in a make-believe world.⁶

Alvarez was prosecuted under § 704(b) of the Stolen Valor Act in the District Court for the Central District of California for his false claim that he was awarded the Congressional Medal of Honor.⁷ The Stolen Valor Act makes it a crime to lie about receiving military decorations and carries an enhanced penalty for lying about receipt of the Congressional Medal of Honor.⁸ The Congressional Medal of Honor is the nation's highest military honor, awarded to members of the U.S. armed forces for exceptional heroism and bravery in combat.⁹ Alvarez entered a conditional guilty plea and reserved his right to challenge the Act's constitutionality.¹⁰ Alvarez was sentenced to three years probation, a \$5000 fine, and 416 hours of community service.¹¹

The Stolen Valor Act is controversial because it imposes a fine and a criminal penalty of up to a year in prison simply for making a false statement about receiving a military decoration, either verbally or by wearing a medal.¹² The First Amendment protects a speaker's right to

³ *Id.* at 1200–01.

⁴ *Id.* at 1201.

⁵ *Id.* After he was charged under the Stolen Valor Act, Alvarez responded, "Somebody is making up stories. What you got there is a bunch of crap." Fred Ortega, *False Medal Claim Denied*, THE SUN (L.A.), Sept. 26, 2007, http://www.sbsun.com/ci_7009147.

⁶ *Alvarez*, 617 F.3d at 1201. During sentencing, the district court indicated that Alvarez's stories lacked credibility and suggested that they may be related to a psychological or alcohol problem. Appellant's Opening Brief at 20 n.5, *Alvarez*, 617 F.3d 1198 (No. 08-50345).

⁷ *Alvarez*, 617 F.3d at 1201; see 18 U.S.C. § 704(b), (c) (2006). Specifically, Alvarez was charged with "falsely represent[ing] verbally that he had been awarded the Congressional Medal of Honor when, in truth and as [he] knew, he had not received the Congressional Medal of Honor." *Alvarez*, 617 F.3d at 1201.

⁸ 18 U.S.C. § 704(a), (b), (c).

⁹ See 32 C.F.R. § 578.4 (2008) ("The deed performed must have been one of personal bravery or self-sacrifice so conspicuous as to clearly distinguish the individual above his comrades and must have involved risk of life."), *reserved by* 73 Fed. Reg. 66754 (Nov. 12, 2008); *Full Archive*, CONG. MEDAL OF HONOR SOC'Y, <http://www.cmohs.org/recipient-archive.php> (last visited Mar. 12, 2012).

¹⁰ Appellant's Opening Brief, *supra* note 6, at 2.

¹¹ *Alvarez*, 617 F.3d at 1201.

¹² See *id.* at 1200.

express ideas, even false ideas or lies, without government interference.¹³ Except in limited categories defined by the U.S. Supreme Court as obscenity, defamation, fraud, incitement, or speech integral to criminal conduct, speech is presumptively protected by the First Amendment.¹⁴ The government must meet strict scrutiny in order to regulate speech protected under the First Amendment.¹⁵ The government has historically regulated false speech that causes harm, such as defamation, by allowing lawsuits with potential *civil* damages, but not criminal penalties.¹⁶ The Stolen Valor Act, which carries potential criminal sanctions, has been challenged by several defendants with varying success as an unconstitutional speech restriction.¹⁷

The Stolen Valor Act seeks to address the perceived harm to veterans' honor and to the government caused by a person lying about receiving a military decoration.¹⁸ Through the Stolen Valor Act, the government attempts to preserve the honor of military decorations, in part to motivate military personnel to high levels of achievement.¹⁹ According to the government, the Stolen Valor Act is necessary to prevent the proliferation of false medals and false claims concerning military service.²⁰

¹³ See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

¹⁴ *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

¹⁵ *Alvarez*, 617 F.3d at 1200. Strict scrutiny is the most stringent standard of judicial review. See John T. Haggerty, Note, *Begging and the Public Forum Doctrine in the First Amendment*, 34 B.C. L. Rev. 1121, 1126 (1993). Under strict scrutiny, the court will determine whether the restriction on a fundamental right is necessary to the furtherance of a compelling state interest and narrowly tailored to serve that interest. *Id.*

¹⁶ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256, 283 (1964).

¹⁷ See *United States v. Perelman (Perelman II)*, 658 F.3d 1134, 1140 (9th Cir. 2011) (holding § 704(a) of the Stolen Valor Act unconstitutional); *Alvarez*, 617 F.3d at 1200 (holding § 704(b) of the Stolen Valor Act unconstitutional); *United States v. Lawless*, No. 11-cr-475-PJM/11-mj-173-TMD, slip op. at 9 (D. Md. Aug. 29, 2011) (holding § 704(b) of the Stolen Valor Act unconstitutional); *United States v. Robbins*, 759 F. Supp. 2d 815, 822 (W.D. Va. 2011) (holding § 704(a) of the Stolen Valor Act unconstitutional); *United States v. Strandlof*, 447 F. Supp. 2d 1183, 1185 (D. Colo. 2010) (holding § 704(b) of the Stolen Valor Act unconstitutional). *But see* *United States v. McGuinn*, No. 07 Cr. 471 (KNF), 2007 WL 3050502, at *3 (S.D.N.Y. Oct. 18, 2007) (holding § 704(a) of the Stolen Valor Act constitutional).

¹⁸ Government's Answering Brief at 6, *Alvarez*, 617 F.3d 1198 (No. 08-50345). In its brief the government states that its interest is in "safeguarding the honor of the nation's war heroes." *Id.*

¹⁹ *United States v. Perelman (Perelman I)*, 737 F. Supp. 2d 1221, 1237 (D. Nev. 2010), *aff'd*, 658 F.3d 1134 (9th Cir. 2011).

²⁰ See *id.*

In the 2010 case *United States v. Alvarez*, the U.S. Court of Appeals for the Ninth Circuit reversed Alvarez's district court conviction and held that the Stolen Valor Act is facially invalid under the First Amendment.²¹ The Ninth Circuit in *Alvarez* held that § 704(b) of the Stolen Valor Act regulates protected speech, does not meet strict scrutiny, is not narrowly drawn to achieve a compelling government interest, and is therefore unconstitutional.²² The Ninth Circuit worried about the Act's potential to set a precedent whereby the government may proscribe speech simply because it is false.²³ On October 17, 2011, the Supreme Court granted certiorari to review the Ninth Circuit's decision in *Alvarez*.²⁴

In contrast to its decision in *Alvarez* that § 704(b) of the Stolen Valor Act warrants strict scrutiny, in the 2011 case *United States v. Perelman* (*Perelman II*), the Ninth Circuit held that § 704(a) of the Stolen Valor Act, regulating falsely wearing a medal, warrants intermediate scrutiny.²⁵ The court reasoned that intermediate scrutiny was sufficient because the section regulates conduct as opposed to speech.²⁶ The Ninth Circuit held that § 704(a) meets the intermediate scrutiny test because there is a substantial government interest unrelated to the suppression of expression and because the restriction imposed on First Amendment freedoms by the Stolen Valor Act is no greater than necessary to further this government interest.²⁷

Part I of this Note describes the history of the Stolen Valor Act and the *Alvarez* case, highlighting the central question of whether the speech proscribed under the Stolen Valor Act warrants strict scrutiny review.²⁸ Part II presents the framework for analyzing whether the First Amendment protects certain classes of speech, namely false speech.²⁹ It then describes the strict scrutiny standard of review that determines whether the government can permissibly regulate protected speech.³⁰ Finally, Part III argues that § 704(b) of the Stolen Valor Act is an un-

²¹ *Alvarez*, 617 F.3d at 1217.

²² *See id.*

²³ *Id.* at 1200.

²⁴ 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210).

²⁵ *Perelman II*, 658 F.3d at 1139.

²⁶ *Id.*

²⁷ *Id.* at 1139–40.

²⁸ *See infra* notes 32–62 and accompanying text.

²⁹ *See infra* notes 63–118 and accompanying text.

³⁰ *See infra* notes 119–170 and accompanying text.

constitutional restriction of speech protected under the First Amendment.³¹

I. THE STOLEN VALOR ACT AND THE *ALVAREZ* DECISION

A. *History and Text of the Stolen Valor Act*

False claims of military decoration have been a concern since the founding of the United States.³² In 1782, General George Washington created the Military Merit Badge, designed in the shape of a purple heart, to be awarded to privates and noncommissioned officers who demonstrated unusual gallantry, extraordinary fidelity, or essential service.³³ Even from the advent of military decorations, General Washington was concerned that imposters may claim to be Military Merit Badge recipients.³⁴ Thus, Washington admonished, “[S]hould any who are not entitled to these honors have the insolence to assume the badges of them, they shall be severely punished.”³⁵

The Stolen Valor Act puts General Washington’s admonition into effect by making it a crime to knowingly wear, purchase, or sell any of the service medals or badges awarded to members of the armed forces.³⁶ The Act also proscribes false verbal or written claims to have re-

³¹ See *infra* notes 171–262 and accompanying text.

³² See 24 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1799, at 487–88 (John C. Fitzpatrick ed., 1938).

³³ *Id.* at 488.

The General ever desirous to cherish virtuous ambition in his soldiers, as well as to foster and encourage every species of Military merit, directs that whenever any singularly meritorious action is performed, the author of it shall be permitted to wear on his facings over the left breast, the figure of a heart in purple cloth, or silk, edged with narrow lace or binding.

Id.

³⁴ See *id.* at 487–88.

³⁵ *Id.* at 487.

³⁶ See 18 U.S.C. § 704(a) (2006). The relevant portion of the text of the Stolen Valor Act is:

(a) In general. Whoever knowingly wears, purchases, attempts to purchase, solicits for purchase, mails, ships, imports, exports, produces blank certificates of receipt for, manufactures, sells, attempts to sell, advertises for sale, trades, barter, or exchanges for anything of value any decoration or medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to the members of such forces, or the ribbon, button, or rosette of any such badge, decoration or medal, or any colorable imitation thereof, except when authorized under regulations made pursuant to law, shall be fined under this title or imprisoned not more than six months, or both. (b) False claims about receipt of military decorations or

ceived military decorations or medals.³⁷ The Stolen Valor Act was enacted in 1923, but the current version broadens the historical scope of the Act.³⁸ The 1923 Act criminalized the unauthorized wearing, manufacture, or sale of medals and badges.³⁹ The current version, passed in 2006, has been expanded to prohibit verbal claims about receiving military awards and other activities, including purchasing, mailing, and importing medals or badges.⁴⁰ The 2006 Act was passed in response to a congressional finding that fraudulent claims regarding the receipt of the Medal of Honor and other military decorations damage their reputation and meaning, and that legislative action was necessary to allow law enforcement to prevent false claims of receiving military decorations.⁴¹

The government has an interest in maintaining the honor associated with military awards.⁴² The purpose of the medals program, according to the government, is to foster military accomplishment by recognizing excellence in the armed forces.⁴³ Accordingly, a violation of the Stolen Valor Act carries a prison term of six months, a fine, or both.⁴⁴ The prison term is enhanced from six months to one year if the

medals. Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both. (c) Enhanced penalty for offenses involving Congressional Medal of Honor. (1) In general. If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor, in lieu of the punishment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both

Id. § 704(a), (b), (c).

³⁷ *Id.*

³⁸ *Id.* § 704(a), (b) (originally enacted as Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286).

³⁹ Act of Feb. 24, 1923, ch. 110, 42 Stat. 1286.

⁴⁰ See 18 U.S.C. § 704(b); *Perelman I*, 737 F. Supp. 2d at 1235.

⁴¹ *Alvarez*, 617 F.3d at 1199 n.1; 151 CONG. REC. S12684 (daily ed. Nov. 10, 2005) (statement of Sen. Conrad). According to one of the bill's sponsors,

[T]here are some individuals who diminish the accomplishments of award recipients by using medals they have not earned. These imposters use fake medals—or claim to have medals that they have not earned—to gain credibility in their communities. These fraudulent acts can often lead to the perpetration of very serious crimes.

151 CONG. REC. S12684 (daily ed. Nov. 10, 2005) (statement of Sen. Conrad).

⁴² *Perelman I*, 737 F. Supp. 2d at 1237.

⁴³ *Id.*

⁴⁴ 18 U.S.C. § 704(a), (b).

decoration involved is the Congressional Medal of Honor, a Distinguished Service Cross, a Navy Cross, an Air Force Cross, a Silver Star, or a Purple Heart.⁴⁵

B. *The Ninth Circuit's United States v. Alvarez Decision*

In 2010 in *Alvarez*, the Ninth Circuit sitting en banc held two-to-one that § 704(b) of the Stolen Valor Act is an unconstitutional restriction of speech protected by the First Amendment because it is not narrowly tailored to achieve a compelling government interest.⁴⁶ The majority held that the speech proscribed by the Stolen Valor Act is not analogous to the narrow categories of speech that fall outside of First Amendment protection: obscenity, defamation, fraud, incitement, or speech integral to criminal conduct.⁴⁷ Because the speech proscribed by the Stolen Valor Act receives full First Amendment protection, any regulation must meet strict scrutiny.⁴⁸ The majority held that, because the Act is not narrowly tailored to achieve a compelling government interest, it does not meet strict scrutiny and is therefore unconstitutional.⁴⁹

⁴⁵ *Id.* § 704(c), (d); see *Alvarez*, 617 F.3d at 1202. The Distinguished Service Cross and the Air Force Cross are military honors one step below the Congressional Medal of Honor and can be awarded to a member of the United States Army or Air Force, respectively, for extraordinary heroism while engaged in action against an enemy of the United States, military operations involving conflict with an opposing foreign force, or while serving with friendly foreign forces engaged in an armed conflict against an opposing armed force in which the United States is not a belligerent party. See 10 U.S.C. §§ 3742, 8742 (2006). The Navy Cross is a similar award for members of the Navy, it is the highest medal awarded by the United States Navy and can be awarded for both combat heroism and other distinguished service. See *The Navy Cross*, NAVAL HIST. & HERITAGE COMMAND, <http://www.history.navy.mil/medals/navcross.htm> (last visited Mar. 12, 2012). The Silver Star is currently awarded by all branches of the armed forces to any person who, while serving in any capacity, is cited for gallantry in action against an enemy of the United States. *Factsheet: Silver Star*, AIR FORCE PERSONNEL CTR., <http://www.afpc.randolph.af.mil/library/factsheets/factsheet.asp?id=7729> (last visited Mar. 12, 2012). Finally, the Purple Heart is an honor awarded to a member of the armed forces who is killed or wounded in action. See 10 U.S.C. § 1129 (2006).

⁴⁶ 617 F.3d at 1200.

⁴⁷ *Id.* at 1202 (quoting *Stevens*, 130 S. Ct. at 1584); see *infra* notes 92–118 and accompanying text (discussing defamation).

⁴⁸ *Alvarez*, 617 F.3d at 1200. Strict scrutiny is the most stringent standard of judicial review. See Haggerty, *supra* note 15, at 1126. Under strict scrutiny, a court will determine whether the restriction on a fundamental right is necessary to the furtherance of a compelling state interest and narrowly tailored to serve that interest. *Id.*

⁴⁹ *Alvarez*, 617 F.3d at 1200.

Both the majority and dissent in *Alvarez* agreed that the Stolen Valor Act did not meet strict scrutiny.⁵⁰ They disagreed, however, on whether the speech proscribed by the Stolen Valor Act is protected under the First Amendment and is therefore *deserving* of strict scrutiny review in the event that it is proscribed.⁵¹ The Stolen Valor Act, both the majority and dissent agreed, did not meet strict scrutiny because the government was unable to show that it is narrowly tailored to achieve a compelling government interest.⁵²

The asserted government interest in the Stolen Valor Act is to prevent false claims about receipt of military honors that damage the reputation of such decorations.⁵³ The Ninth Circuit suggested that this is not a compelling government interest.⁵⁴ The court reasoned that embellished war stories are easily detectable falsehoods and that lies about military decorations only harm the reputation of the liars; thus, the court concluded that such lies pose no real threat to the honor associated with military decorations.⁵⁵ Further, according to the Ninth Circuit, the Stolen Valor Act is not narrowly tailored to achieve the government interest because there are less speech-restrictive ways to protect the honor associated with military decorations.⁵⁶ The harm caused by false claims about military decorations can be easily corrected in the marketplace of ideas by publishing lists of true award recipients.⁵⁷

The fundamental disagreement between the majority and the dissent in *Alvarez* is whether statements regulated by the Stolen Valor Act, and false statements of fact generally, warrant strict scrutiny or whether they fall completely outside of First Amendment protection.⁵⁸ The dis-

⁵⁰ See *id.* at 1215–17. In their petition for certiorari to the Supreme Court, the government argues that § 704(b) of the Stolen Valor Act would pass strict scrutiny because the Act is narrowly tailored to satisfy a compelling government interest. Petition for Writ of Certiorari at 29, *Alvarez*, 617 F.3d 1198 (2010) (No. 11-210), 2011 WL 3645396 at *29.

⁵¹ See *Alvarez*, 617 F.3d at 1232 n.10 (Bybee, J., dissenting).

⁵² *Id.* at 1216 (majority opinion); *id.* at 1232 n.10 (Bybee, J., dissenting).

⁵³ *Id.* at 1216 (majority opinion).

⁵⁴ See *id.* at 1217.

⁵⁵ See *id.*

⁵⁶ *Id.*

⁵⁷ *Alvarez*, 617 F.3d at 1216–17. *Alvarez*'s lie was detected in the marketplace even before he faced criminal prosecution. *Id.* at 1216. There are several online grassroots organizations designed to expose people who lie about military decorations. See *Hall of Stolen Valor*, MILITARY TIMES, <http://militarytimes.com/projects/hallofstolenvalor> (last visited Mar. 12, 2012); *Report Stolen Valor*, AMVETS, <http://www.reportstolenvalor.org> (last visited Mar. 12, 2012); *Stolen Valor: Heroes and Patriots. Or Are They?*, STOLENVALOR.COM, <http://www.stolenvalor.com> (last visited Mar. 12, 2012) (including a link to "Report a Fake").

⁵⁸ See *Alvarez*, 617 F.3d at 1216–17; *id.* at 1232 n.10 (Bybee, J., dissenting).

sent in *Alvarez* argued that the false statements of fact proscribed by the Stolen Valor Act are not protected by the First Amendment and thus can be regulated without meeting strict scrutiny.⁵⁹ The dissent started from the premise that false statements of fact are not, and were never, protected under the First Amendment.⁶⁰ The dissent relied on a 1974 Supreme Court decision, *Gertz v. Robert Welch, Inc.*, for the proposition that a false statement of fact is not worthy of constitutional protection.⁶¹ Therefore, according to the dissent, because false statements of fact like those the Stolen Valor Act prohibits are not protected under the First Amendment, they may be constitutionally proscribed without passing the strict scrutiny test.⁶²

II. THE STOLEN VALOR ACT AND FIRST AMENDMENT FRAMEWORK

This Part discusses the First Amendment framework for determining when and how the government may regulate speech, including the false speech criminalized by the Stolen Valor Act.⁶³ Section A discusses the presumption of First Amendment protection for all speech, including false speech.⁶⁴ Section B then addresses these categories of speech that the Supreme Court has held fall outside of First Amendment protection.⁶⁵ Section C explains that the government must satisfy strict scrutiny to regulate protected speech, including false verbal claims about military decorations.⁶⁶ It further contrasts the requisite strict scrutiny review of proscribed, protected speech with the intermediate review standard used to analyze regulated communicative conduct.⁶⁷ Finally, Section D addresses constitutional challenges on overbreadth grounds, but concludes that the Stolen Valor Act's constitutional infirmity is likely not overbreadth.⁶⁸

⁵⁹ See *id.* at 1218–19, 1231.

⁶⁰ *Id.* at 1220 n.1.

⁶¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[T]here is no constitutional value in false statements of fact . . .”); *Alvarez*, 617 F.2d at 1221 (Bybee, J., dissenting).

⁶² *Alvarez*, 617 F.3d at 1223 (Bybee, J., dissenting). The dissent agrees with the majority that if the Stolen Valor Act were subject to strict scrutiny, it would not satisfy the test. *Id.* at 1232.

⁶³ See *infra* notes 64–170 and accompanying text.

⁶⁴ See *infra* notes 69–91 and accompanying text.

⁶⁵ See *infra* notes 92–118 and accompanying text.

⁶⁶ See *infra* notes 119–149 and accompanying text.

⁶⁷ See *infra* notes 119–149 and accompanying text.

⁶⁸ See *infra* notes 150–170 and accompanying text.

A. *The First Amendment Protects False Speech*

One scholar has suggested that understanding the relationship between deception and free speech is central to understanding the First Amendment.⁶⁹ Although the First Amendment prevents the government from regulating speech simply because the government or society finds the idea worthless or offensive—content-based speech restrictions—the prevention and punishment of certain well-defined and narrow classes of speech does not raise any constitutional problems.⁷⁰ Nonetheless, the First Amendment imposes a presumption against government interference with public discourse.⁷¹

The U.S. Supreme Court has a strong tradition of protecting even unpopular ideas and controversial beliefs.⁷² The Supreme Court has explained, however, that the First Amendment does not protect all types of speech.⁷³ Some *false* speech, such as defamation or shouting “fire” in a crowded theatre without cause, is carved out and afforded less or no First Amendment protection.⁷⁴ In such cases, the false speech is unprotected because it causes harm by violating a private right or because it creates a clear and present danger or “substantive evil[] that Congress has a right to prevent.”⁷⁵

Constitutional protection, however, does not turn on the truth, popularity, or social utility of the ideas and beliefs expressed.⁷⁶ In 1964 in *New York Times Co. v. Sullivan*, the Supreme Court held that a news-

⁶⁹ Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1140 (2006).

⁷⁰ *Chaplinsky v. State of N.H.*, 315 U.S. 568, 571–72 (1942). In *United States v. Robbins*, the District Court for the Western District of Virginia did not follow *Chaplinsky*, holding that false statements of fact are generally unprotected and that protection is only afforded to “speech that matters.” See 759 F. Supp. 2d 815, 818 (W.D. Va. 2011).

⁷¹ Lyrrisa Barnett Lidsky, *Where’s the Harm?: Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091, 1091–92 (2008); see *United States v. Alvarez*, 617 F.3d 1198, 1205 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210) (“[W]e presumptively protect *all* speech against government interference, leaving it to the government to demonstrate, either through a well-crafted statute or case-specific application, the historical basis for or a compelling need to remove some speech from protection.”).

⁷² See *Texas v. Johnson*, 491 U.S. 397, 420 (1989); *Watts v. United States*, 394 U.S. 705, 708 (1969). Some European countries have less protection for speech than the United States and punish people who deny the Holocaust occurred. See Lidsky, *supra* note 71, at 1099.

⁷³ *Chaplinsky*, 315 U.S. at 571–72.

⁷⁴ See *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010); *Schenck v. United States*, 249 U.S. 47, 52 (1919).

⁷⁵ See *Schenck*, 249 U.S. at 52; Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 238 (1992).

⁷⁶ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

paper advertisement does not forfeit First Amendment protection because some included statements were false and allegedly defamatory.⁷⁷

The Supreme Court recently reaffirmed this presumption of protection by rejecting a balancing test for determining when a false statement receives First Amendment protection.⁷⁸ The government, according to the Court, cannot proscribe false speech simply because it is deemed valueless or unnecessary following an ad hoc balancing of its values against its harms.⁷⁹

Despite the constitutional presumption of protection for speech, courts that have upheld the Stolen Valor Act as constitutional question whether *knowingly* false statements of fact, such as lying about military decorations, truly add value to public discourse and dialogue.⁸⁰ There is Supreme Court support for the proposition that there is no value to knowingly false speech.⁸¹ In the 1942 case of *Chaplinsky v. State of New Hampshire*, the Supreme Court said that false speech has “no essential part of any exposition of ideas” and provides “slight social value as a step to truth.”⁸² In 1974, the Supreme Court, in *Gertz v. Robert Welch, Inc.*, also stated that false statements of fact do not hold any constitutional value.⁸³ The dissent in the 2010 U.S. Court of Appeals for the Ninth Circuit case *United States v. Alvarez* and other courts that have

⁷⁷ *Id.* at 271.

⁷⁸ See *Stevens*, 130 S. Ct. at 1585.

⁷⁹ *Id.*; *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1186 (D. Colo. 2010) (“The government’s argument, which invites it to determine what topics of speech ‘matter’ enough for the citizenry to hear, is troubling, as well as contrary, on multiple fronts, to well-established First Amendment doctrine.”). In 2010, in *United States v. Stevens*, the Supreme Court held that a 1999 federal law criminalizing the commercial creation, sale, or possession of depictions of animal cruelty was substantially overbroad, and thus, facially invalid. *Stevens*, 130 S. Ct. at 1592. The statute was designed to address “crush videos,” videos showing people killing small animals by stomping on them or other cruel methods. See *id.* at 1583.

⁸⁰ See *United States v. Perelman (Perelman II)*, 658 F.3d 1134, 1137 (9th Cir. 2011); *Robbins*, 759 F. Supp. 2d at 819.

⁸¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *Chaplinsky*, 315 U.S. at 572.

⁸² 315 U.S. at 572.

⁸³ 418 U.S. at 340. The Court wrote:

Neither the intentional lie nor the careless error materially advances society’s interest in “uninhibited, robust, and wide-open” debate on public issues. They belong to that category of utterances which “are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

Id. (citations omitted) (quoting *N.Y. Times*, 376 U.S. at 270; *Chaplinsky*, 315 U.S. at 572). In *Milkovich v. Lorain Journal Co.*, the Supreme Court recognized the declaration in *Gertz* to be dictum. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990).

held the Stolen Valor Act constitutional have relied on *Gertz* for the proposition that *knowingly* false statements of fact fall outside of First Amendment protection.⁸⁴

Even though knowingly false statements of fact may have little inherent value, they are inevitable in free debate and must be tolerated to avoid chilling vigorous debate and exchange of ideas.⁸⁵ A rule compelling a person to guarantee the truth of all factual assertions could lead to self-censorship.⁸⁶ Punishing false statements would risk making people overly cautious in the exercise of their freedoms of speech and press.⁸⁷ Erroneous statements must therefore be protected for freedom of expression to have the breathing space needed to survive.⁸⁸ Perhaps it was this concern about the chilling effects of withholding constitutional protection for knowingly false statements that led the Supreme Court in *Gertz*, to also state that there is no such thing as a false idea (as opposed to a false statement of fact) under the First Amendment.⁸⁹ The Court said that the marketplace of ideas, through public debate and discourse, was the proper forum to correct falsehood, not the judicial system or the government.⁹⁰ Mistaken beliefs, according to the Court, hold value in the marketplace of ideas because they offer contrast and thus create a clearer perception of the truth.⁹¹

B. *Narrow Categories of False Speech That Fall Outside of First Amendment Protection and Defamation Analysis*

The First Amendment presumptively protects all speech from government regulation; however, there are limitations to this protection.⁹² If the government demonstrates a compelling need to regulate speech or if the speech is in a category of speech historically held outside of

⁸⁴ See *Alvarez*, 617 F.3d at 1218 (Bybee, J., dissenting); *Robbins*, 759 F. Supp. 2d at 819.

⁸⁵ *Gertz*, 418 U.S. at 340.

⁸⁶ *N.Y. Times*, 376 U.S. at 279.

⁸⁷ *Id.*

⁸⁸ *Id.* at 271–72; *NAACP v. Button*, 371 U.S. 415, 433 (1963) (“Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”); see also *Brown v. Hartlage*, 456 U.S. 45, 60–61 (1982).

⁸⁹ *Gertz*, 418 U.S. at 339–40 (“Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.”).

⁹⁰ *Id.*

⁹¹ JOHN STUART MILL, ON LIBERTY 16 (Elizabeth Rapaport ed., 1978) (1859).

⁹² See *Alvarez*, 617 F.3d at 1205. In 1996, Justice Elena Kagan, then a law professor, recognized the near absolute First Amendment protection afforded to false, but non-defamatory, statements of fact outside of the commercial realm. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 477 (1996).

First Amendment protection, then the speech may be constitutionally restricted.⁹³ Certain narrow categories of false speech have been carved out and afforded less First Amendment protection, such as defamation, false commercial speech, and fraud.⁹⁴

Of the categories of speech that are afforded less First Amendment protection, false statements prohibited by the Stolen Valor Act are most like defamatory statements.⁹⁵ Defamation is the act of harming the reputation of another by making a false statement to a third person.⁹⁶ It is regulated through civil suits brought when such false statements cause individualized harm.⁹⁷ As such, the Stolen Valor Act is akin to defamation only if the reputation of an individual decorated veteran is harmed by a speaker's false claim about valor.⁹⁸

Defamation law is justified by the government interest in compensating individual victims of defamatory falsehoods.⁹⁹ It is designed to protect an individual's property interest in his or her good name.¹⁰⁰ In a defamation case, the court balances the government interest in compensating defamation plaintiffs for reputational harm against the speaker-defendant's First Amendment freedom of speech.¹⁰¹ To achieve this balance, the court has developed a series of rules based on the identity of the plaintiff (whether the plaintiff is a private or public figure) and the nature of the subject matter (whether it is a matter of public concern).¹⁰² When a defamation plaintiff is a public figure and the speaker is criticizing public conduct or speaking on a matter of public concern, the court is willing to afford the speaker more First Amendment protection.¹⁰³ This is, in part, because public figures are better able to engage in effective counterspeech.¹⁰⁴ False statements

⁹³ *Stevens*, 130 S. Ct. at 1584; *Alvarez*, 617 F.3d at 1205. The dissent in *Alvarez* stated that false statements are unprotected by the First Amendment, except in narrow categories where protection is necessary to protect speech that matters. 617 F.3d at 1218–19 (Bybee, J., dissenting).

⁹⁴ *See Stevens*, 130 S. Ct. at 1584; *Alvarez*, 617 F.3d at 1205.

⁹⁵ *See Stevens*, 130 S. Ct. at 1584; *Alvarez*, 617 F.3d at 1205.

⁹⁶ BLACK'S LAW DICTIONARY 479–80 (9th ed. 2009).

⁹⁷ *See State of Wash. ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691, 697 (Wash. 1998).

⁹⁸ *See 119 Vote No!*, 957 P.2d at 697.

⁹⁹ *See id.*

¹⁰⁰ *Id.*

¹⁰¹ *See Gertz*, 418 U.S. at 341; *N.Y. Times*, 376 U.S. at 254.

¹⁰² ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1045 (3d ed. 2006).

¹⁰³ *See Gertz*, 418 U.S. at 344; *N.Y. Times*, 376 U.S. at 256.

¹⁰⁴ *See Gertz*, 418 U.S. at 344.

regarding private persons in a matter of private concern, however, receive less protection.¹⁰⁵

The Supreme Court first addressed defamation of a public official in *New York Times Co. v. Sullivan* in 1964 and limited the circumstances under which a public official may recover for defamation.¹⁰⁶ In *New York Times*, a city commissioner brought a libel claim against the newspaper for printing an advertisement critical of his official conduct.¹⁰⁷ The advertisement included false factual statements that reflected poorly on the City Commissioner.¹⁰⁸ The Supreme Court held that the advertisement was entitled to First Amendment protection despite the false statements.¹⁰⁹ According to the Court, erroneous statements are inevitable in free debate and must be protected if freedom of expression is to have the breathing space necessary to survive.¹¹⁰ A public official may only recover for defamation if the plaintiff can show that the statement was made with actual malice, meaning that the speaker intended to cause harm and either had knowledge that the statement was false or acted with reckless disregard for the truth.¹¹¹

Ten years after *New York Times*, in *Gertz*, the Supreme Court addressed defamation of a private individual regarding a matter of public concern.¹¹² In *Gertz*, the Supreme Court distinguished between public and private figures and described why different standards apply to each.¹¹³ Public figures tend to enjoy greater access to the channels of effective communication and have a more realistic opportunity to counteract false statements than private individuals.¹¹⁴ Moreover, public figures have made the choice to be in the public eye and thus volun-

¹⁰⁵ *Id.*

¹⁰⁶ See 376 U.S. at 256.

¹⁰⁷ *Id.* Libel is written defamation. BLACK'S LAW DICTIONARY, *supra* note 96, at 999.

¹⁰⁸ *N.Y. Times*, 376 U.S. at 257–58. Statements included:

In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was padlocked in an attempt to starve them into submission.

Id.

¹⁰⁹ *Id.* at 292.

¹¹⁰ *Id.* at 271–72.

¹¹¹ *Id.* at 279–80.

¹¹² *Gertz*, 418 U.S. at 332.

¹¹³ *Id.* at 323.

¹¹⁴ *Id.* at 344.

tarily exposed themselves to increased risk of injury from defamatory falsehoods.¹¹⁵

In sum, the First Amendment provides significantly less protection for speech that falls within several limited categories, such as fraudulent and defamatory speech.¹¹⁶ Within these categories, there are gradations of First Amendment protection.¹¹⁷ For example, although fraudulent speech receives absolutely no First Amendment protection, courts are less willing to proscribe defamatory speech against a public official because public officials have greater opportunities for effective counterspeech than private individuals.¹¹⁸

C. The Court Must Apply Strict Scrutiny to Determine When the Government May Regulate Protected Speech and Intermediate Scrutiny to Determine When the Government May Regulate Communicative Conduct

1. Courts Review Regulation of Protected Speech Under a Strict Scrutiny Standard

Both the majority and the dissent in *Alvarez* agreed that § 704(b) of the Stolen Valor Act is a content- or subject-matter-based speech restriction because it regulates false verbal or written representations about a particular topic—receiving military honors.¹¹⁹ Content-based restrictions regulate speech based on the topic of the speech.¹²⁰ Content-based speech restrictions, like section 704(b) of the Stolen Valor Act, are particularly dangerous for free speech because the government can target particular messages and control ideas by regulating speech on a specific topic.¹²¹ If the government regulates particular views or

¹¹⁵ *Id.* at 345.

¹¹⁶ *See Stevens*, 130 S. Ct. at 1584.

¹¹⁷ *See Gertz*, 418 U.S. at 344; *N.Y. Times*, 376 U.S. at 256.

¹¹⁸ *See Gertz*, 418 U.S. at 344; *N.Y. Times*, 376 U.S. at 256.

¹¹⁹ *United States v. Alvarez*, 638 F.3d 666, 667 (9th Cir. 2011) (denying petition for panel rehearing and rehearing en banc); *Alvarez*, 617 F.3d at 1202, 1218–19 (Bybee, J., dissenting). For the purposes of this Note, this category of speech restrictions is referred to as “content-based” restrictions.

¹²⁰ CHEMERINSKY, *supra* note 102, at 934. An example of a law that restricts speech based on the subject matter is a Chicago ordinance prohibiting all picketing in residential neighborhoods except labor picketing. *See Carey v. Brown*, 447 U.S. 455, 459–60 (1980). In the 1980 case *Carey v. Brown*, the Supreme Court held that the Chicago ordinance was unconstitutional because it allowed speech on the topic of labor but not other speech and therefore was not subject matter neutral. *Id.* at 456. Similarly, the Stolen Valor Act restricts lies about a specific topic. *See id.*

¹²¹ *See Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

subjects, it silences speakers who express views on disfavored subjects.¹²² Thus, content-based speech restrictions distort the marketplace of ideas and seriously impede free discussion and debate.¹²³

Viewpoint discrimination is a particularly egregious form of content-based restriction that discriminates based on a speaker's position on a topic.¹²⁴ Section 704(b) of the Stolen Valor Act may be considered viewpoint discrimination because the Act prevents people from telling lies that disparage military honors.¹²⁵ In the District Court for the District of Nevada, in the 2010 case *United States v. Perelman*, attorneys for Perelman argued that the Stolen Valor Act impermissibly gives the government discretion to engage in viewpoint-based regulation of speech by allowing some people, but not others, to wear military medals based on their purpose for wearing the medal.¹²⁶ The district court, however, held that the Stolen Valor Act is not impermissible because military regulations provide an across-the-board prohibition on the unauthorized wearing of medals with the intent to deceive and do not allow the government any discretion to decide who can and cannot wear medals on a case-by-case basis.¹²⁷ Even though the court was not persuaded by Perelman's claim of viewpoint-based discrimination, the Stolen Valor Act is still a content-based restriction and thus presumptively invalid due to the dangers discussed above.¹²⁸

Content-based speech restrictions are presumptively invalid and subject to strict scrutiny unless the restriction falls into a narrow category of speech that is unprotected by the First Amendment.¹²⁹ Thus, if

¹²² See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

¹²³ CHEMERINSKY, *supra* note 102, at 934. The marketplace of ideas is a metaphor for freedom of speech and is basically a forum where ideas can compete for acceptance without government regulation. BLACK'S LAW DICTIONARY, *supra* note 96, at 1058.

¹²⁴ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); CHEMERINSKY, *supra* note 102, at 934. For example, the Supreme Court declared a District of Columbia ordinance that prohibited the display of signs critical of another government within 500 feet of that government's embassy to be an unconstitutional viewpoint-based regulation. See *Boos v. Berry*, 485 U.S. 312, 334 (1988).

¹²⁵ See *Perelman II*, 658 F.3d at 1204 n.4.

¹²⁶ *United States v. Perelman (Perelman I)*, 737 F. Supp. 2d 1221, 1232 (D. Nev. 2010), *aff'd*, 658 F.3d 1134 (9th Cir. 2011). A licensing scheme or a prior restraint is a scheme that requires permission from the government before one may engage in constitutionally protected expression. *Id.* at 1237. Attorneys for Perelman argued that under the Act, the government could permit an actor in a patriotic theatrical production to wear a medal, but deny a war protester's request to wear the same medal. *Id.* at 1232.

¹²⁷ *Id.* at 1232–33.

¹²⁸ See *Alvarez*, 617 F.3d at 1202; *Perelman I*, 737 F. Supp. 2d at 1232–33.

¹²⁹ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (“[T]he First Amendment, subject only to narrow and well understood exceptions, does not countenance gov-

the Stolen Valor Act regulates speech protected under the First Amendment, the government must meet strict scrutiny for the Act to be constitutional.¹³⁰ Strict scrutiny requires the government to show that there is a compelling government interest for the regulation of speech and that the regulation is narrowly tailored to serve that interest.¹³¹

2. Courts Apply Intermediate Scrutiny to Regulations of Communicative Conduct

In contrast to making a statement, wearing a medal is communicative *conduct*; therefore, § 704(a) of the Stolen Valor Act, which makes it a crime to wear a military decoration without authorization, is subject to intermediate scrutiny.¹³²

The Supreme Court has long afforded First Amendment protection to communicative conduct because it often functions as symbolic speech.¹³³ The government can regulate communicative conduct if the regulation meets the intermediate scrutiny test laid out by the Supreme Court in 1969 in *United States v. O'Brien*.¹³⁴

In *Perelman*, for example, the court distinguished Perelman's prosecution under § 704(a), which criminalizes the unauthorized wear of a military decoration, from Alvarez's prosecution under § 704(b), which prohibits verbal or written false claims about military decorations.¹³⁵ The Ninth Circuit held that § 704(a) targets legitimately criminal conduct and therefore that section of the Stolen Valor Act is constitu-

ernment control over the content of messages expressed by private individuals."); *R.A.V.*, 505 U.S. at 382; *supra* notes 92–118 and accompanying text.

¹³⁰ *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 804 (2000); *Turner*, 512 U.S. at 623. Regulations that are unrelated to the content of speech must meet the lower standard of intermediate scrutiny. *Turner*, 512 U.S. at 642. In *Turner*, the court held that "the First Amendment, subject to only narrow and well understood exceptions, does not countenance government control over the content of messages expressed by private individuals." *Id.* at 641.

¹³¹ *Citizens United v. FEC*, 130 S. Ct. 876, 882 (2010); *Alvarez*, 617 F.3d at 1216.

¹³² *See Johnson*, 491 U.S. at 405–06.

¹³³ *See Spence v. Washington*, 418 U.S. 405, 406 (1974) (holding that taping a peace sign on the American flag is speech protected under the First Amendment); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943) (invalidating a law that required students to salute the flag); *Stromberg v. California*, 283 U.S. 359, 376 (1931) (declaring unconstitutional a state law that prohibited the display of a red flag).

¹³⁴ 391 U.S. 367, 376 (1969).

¹³⁵ *Perelman II*, 658 F.3d at 1138–39.

tional.¹³⁶ The Ninth Circuit also noted that § 704(b), in contrast, targets pure speech and is therefore distinguishable.¹³⁷

Conduct can be communicative when there is intent to convey a particular message and a substantial likelihood that the message will be understood by those who view it.¹³⁸ Communicative conduct, such as wearing a medal, can be regarded as expressive or symbolic speech.¹³⁹ For instance, in the 1969 case *Tinker v. Des Moines Independent Community School District*, the Supreme Court held that wearing a black armband to protest the Vietnam War was symbolic speech because the black armband was worn to communicate a message and people viewing the black armband in 1965 would understand that the speaker intended to protest the Vietnam War.¹⁴⁰ Similarly, wearing a military medal is symbolic speech because the person wearing the medal intends to convey a message (i.e., of having received a military decoration, of patriotism, etc.) and, based on the context of the communication, there is a substantial likelihood that the speaker's message will be understood by viewers.¹⁴¹

Communicative conduct (expressive or symbolic speech) can be regulated if the regulation meets the *O'Brien* intermediate scrutiny test.¹⁴² Under the *O'Brien* test, the government can regulate communicative conduct when: (1) there is an important government interest in regulating the speech unrelated to the suppression of the message and (2) the regulation's impact on First Amendment freedoms is no greater than what is essential to achieve the government interest.¹⁴³ In *O'Brien*, the Supreme Court held that a statute prohibiting the burning of draft cards was not an unconstitutional restriction of First Amendment speech because the government had an important interest, unrelated to the regulation of speech, in the administration of the draft and that draft cards were necessary to achieve that government interest.¹⁴⁴

To satisfy intermediate scrutiny and regulate communicative conduct, the law cannot be hostile to speech.¹⁴⁵ By requiring the government interest to be unrelated to the suppression of speech, the *O'Brien*

¹³⁶ *Id.* at 1139.

¹³⁷ *Id.*

¹³⁸ *Spence*, 418 U.S. at 410–11.

¹³⁹ *See Johnson*, 491 U.S. at 405–06.

¹⁴⁰ 393 U.S. 503, 505 (1969).

¹⁴¹ *See Spence*, 418 U.S. at 410–11.

¹⁴² *O'Brien*, 391 U.S. at 376.

¹⁴³ *Id.* at 377.

¹⁴⁴ *Id.*

¹⁴⁵ *See id.* at 381–82.

test ensures that the speaker is not sanctioned for communicating, but instead is convicted for the non-communicative aspect of the conduct.¹⁴⁶ This prevents the government from suppressing communicative conduct simply because it disagrees with the message.¹⁴⁷

The Ninth Circuit in *Perelman* held that § 704(a) of the Stolen Valor Act, which makes it a crime to wear a military decoration without authorization, is a constitutional restriction on communicative conduct because it meets the *O'Brien* test.¹⁴⁸ The Ninth Circuit also held that the government has a compelling interest in preventing intentionally deceptive medal-wearing and that this interest is unrelated to the suppression of speech because § 704(a) does not prevent the expression of any particular message or viewpoint.¹⁴⁹

D. *Challenges on Overbreadth Grounds*

In an area in which the government may permissibly regulate speech, such as incitement or defamation, a statute that regulates more expression than the Constitution allows may be unconstitutionally overbroad.¹⁵⁰ For instance, if the court were to find the Stolen Valor Act constitutional as applied to an individual litigant, the Act may still be vulnerable to an overbreadth challenge because it may have unconstitutional applications on its face.¹⁵¹

The party asserting an overbreadth challenge must show that a substantial number of a statute's applications are unconstitutional in relation to the statute's plainly legitimate sweep.¹⁵² An overbroad statute is unconstitutional even if the government exercises prosecutorial discretion and uses the statute only for its constitutional applications.¹⁵³ The overbreadth doctrine allows a speaker to whom the statute may be constitutionally applied to challenge the statute on grounds that it violates the First Amendment rights of someone else.¹⁵⁴ Thus, the over-

¹⁴⁶ See *id.* at 382.

¹⁴⁷ See *id.*; see also *Stromberg*, 283 U.S. at 369 (striking down a statute that punished people who expressed opposition to organized government by displaying a flag).

¹⁴⁸ *Perelman II*, 658 F.3d at 1140.

¹⁴⁹ *Id.* at 1139–40.

¹⁵⁰ See *CHEMERINSKY*, *supra* note 102, at 943.

¹⁵¹ See *United States v. McGuinn*, No. 07 Cr. 471(KNF), 2007 WL 3050502, at *1–3 (S.D.N.Y. Oct. 18, 2007).

¹⁵² *New York v. Ferber*, 458 U.S. 747, 770 (1982).

¹⁵³ See *Stevens*, 130 S. Ct. at 1581; *United States v. Lawless*, No. 11-cr-475-PJM/11-mj-173-TMD, slip op. at 8 (D. Md. Aug. 29, 2011).

¹⁵⁴ *Stevens*, 130 S. Ct. at 1593; see *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 615–16 (1973); *CHEMERINSKY*, *supra* note 102, at 943–46.

breadth doctrine is an exception to the rule against third-party standing.¹⁵⁵ It has been described as “strong medicine” and is used sparingly.¹⁵⁶ The doctrine will only apply if the court finds that a statute was constitutionally applied to an individual litigant because, otherwise, the litigant would not have to rely on the overbreadth doctrine.¹⁵⁷

The Stolen Valor Act, if found constitutionally applied to a particular litigant, may be found facially overbroad because of potential unconstitutional applications of the statute.¹⁵⁸ For instance, the Stolen Valor Act could be applied to a speaker who knowingly makes false statements about military decorations to send an anti-government or anti-military political message.¹⁵⁹ Military decorations may also be worn to honor a loved one or for satirical purposes.¹⁶⁰ Courts may find it difficult to determine whether someone is wearing military decorations to deceive or for a proper purpose.¹⁶¹

The Stolen Valor Act may also be considered overbroad because it does not contain a scienter requirement.¹⁶² Consequently, someone who has no intent to deceive may unknowingly violate the Act.¹⁶³ For example, someone who says, “I have a Congressional Medal of Honor,” but simply means that they possess a Congressional Medal of Honor as a family heirloom, may technically violate the Act.¹⁶⁴

The Stolen Valor Act will not be considered facially overbroad if it is readily susceptible to a construction that eliminates the overbreadth.¹⁶⁵ A scienter requirement is presumptively read into criminal statutes even

¹⁵⁵ *Alvarez*, 617 F.3d at 1235 (Bybee, J., dissenting); CHEMERINSKY, *supra* note 102, at 946.

¹⁵⁶ *Broadrick*, 413 U.S. at 613.

¹⁵⁷ *See Stevens*, 130 S. Ct. at 1593; *Alvarez*, 617 F.3d at 1235 (Bybee, J., dissenting).

¹⁵⁸ *See McGuinn*, 2007 WL 3050502, at *1–3.

¹⁵⁹ *See id.* Speech made for political purposes or other matters of public concern is traditionally entitled to increased First Amendment deference. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985).

¹⁶⁰ *Alvarez*, 617 F.3d at 1236–37 (Bybee, J., dissenting).

¹⁶¹ Dane Schiller, *Fake General: It Was Free Speech, Not Fraud: Man Faces Charges After Sporting Medals at Mayor's Party*, HOUS. CHRON., Sept. 27, 2010, at B1. For example, in 2009, Michael McManus wore an Army brigadier general's uniform and an array of medals and Distinguished Service Crosses to a party for Houston's first openly gay mayor. *Id.* McManus is now being prosecuted under the Stolen Valor Act and claims that he never meant to suggest that he was a true war hero, but instead wore the medals in order to make a political commentary about the military's policy on gays. *Id.*

¹⁶² *Alvarez*, 617 F.3d at 1237 (Bybee, J., dissenting).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

if not explicitly expressed in the statute.¹⁶⁶ In *United States v. Robbins*, for example, the District Court for the Western District of Virginia read a scienter requirement into the Stolen Valor Act and found the Act constitutional.¹⁶⁷

The Stolen Valor Act will probably not be considered facially overbroad because courts could read a scienter requirement into the statute.¹⁶⁸ Therefore, the remainder of this Note will focus on the tension between the Stolen Valor Act and the First Amendment.¹⁶⁹ The next Part argues that § 704(b) of the Stolen Valor Act is an unconstitutional violation of the First Amendment because it impermissibly proscribes protected speech, which warrants a strict scrutiny review that it cannot satisfy.¹⁷⁰

III. THE STOLEN VALOR ACT UNCONSTITUTIONALLY RESTRICTS SPEECH IN VIOLATION OF THE FIRST AMENDMENT

This Part argues that § 704(b) of the Stolen Valor Act is unconstitutional.¹⁷¹ It begins, in Section A, by demonstrating that the Stolen Valor Act regulates speech protected by the First Amendment.¹⁷² It establishes that there is no categorical exception to First Amendment protection for lies, that the Stolen Valor Act is not analogous to any category of unprotected speech, and that no new category should be created to cover lies about valor.¹⁷³ Section B contends that prohibiting lies under the Stolen Valor Act constitutes a content-based restriction, an impermissible effort to restrict speech on grounds that it lacks value.¹⁷⁴ Thus, strict scrutiny must be applied to verbal lies about military decorations.¹⁷⁵ Finally, Section C argues that § 704(b) of the Stolen Valor Act does not satisfy strict scrutiny for three reasons: (1) the government interests in the Stolen Valor Act are merely symbolic, (2) lies

¹⁶⁶ *United States v. X-citement Video, Inc.*, 513 U.S. 64, 68–69 (1994).

¹⁶⁷ 759 F. Supp. 2d at 819.

¹⁶⁸ *See id.* The Heck Amendment attempts to address the constitutionality of the Stolen Valor Act by adding an explicit intent requirement to the statute. Stolen Valor Act of 2011, H.R. 1775, 112th Cong. (2011). The bill has been referred to the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security, but no hearings have been scheduled and no comparable legislation has been introduced in the Senate. Reply Brief for the United States at 6, *Akwarez*, 617 F.3d 1198 (No. 08-50345).

¹⁶⁹ *See infra* notes 170–262 and accompanying text.

¹⁷⁰ *See infra* notes 171–262 and accompanying text.

¹⁷¹ *See infra* notes 172–262 and accompanying text.

¹⁷² *See infra* notes 177–202 and accompanying text.

¹⁷³ *See infra* notes 177–202 and accompanying text.

¹⁷⁴ *See infra* notes 203–219 and accompanying text.

¹⁷⁵ *See infra* notes 203–219 and accompanying text.

about military decorations do not harm any individual, and (3) there are less speech-restrictive means to achieve the government objective, most notably counterspeech about truly decorated veterans.¹⁷⁶

A. *The Stolen Valor Act Regulates Protected Speech*

Lies are protected speech under the First Amendment.¹⁷⁷ The First Amendment permits speech restrictions based on the content of the speech only in well-defined and limited areas, such as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.¹⁷⁸ Thus, *Gertz v. Robert Welch, Inc.*, in which the U.S. Supreme Court in 1974 held that false statements of fact are not inherently worthy of First Amendment protection, does not stand for the proposition that all false statements fall outside of First Amendment protection.¹⁷⁹ Indeed, only narrow categories, such as defamation, have been carved out from First Amendment protection.¹⁸⁰

Lies prohibited under the Stolen Valor Act do not fall into any of the categories that receive less First Amendment protection.¹⁸¹ The Sto-

¹⁷⁶ See *infra* notes 220–262 and accompanying text.

¹⁷⁷ See *United States v. Alvarez*, 617 F.3d 1198, 1202–03 (9th Cir. 2010), *cert. granted*, 80 U.S.L.W. 3098 (U.S. Oct. 17, 2011) (No. 11-210).

¹⁷⁸ *United States v. Stevens*, 130 S. Ct. 1577, 1580 (2010); *Chaplinsky v. State of N.H.*, 315 U.S. 568, 571–72 (1942).

¹⁷⁹ See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974); *Alvarez*, 617 F.3d at 1202–03. *But see* Christopher P. Guzelian, *True and False Speech*, 51 B.C. L. REV. 669, 717–18 (2010) (advocating predictable liability for false scientific speech).

¹⁸⁰ See *Stevens*, 130 S. Ct. at 1581; *Alvarez*, 617 F.3d at 1206–07; *see also* *Chaplinsky*, 315 U.S. at 571–72 (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.”). First Amendment exceptions must be narrowly tailored in order to protect First Amendment rights. See *Chaplinsky*, 315 U.S. at 571–72.

¹⁸¹ See *Stevens*, 130 S. Ct. at 1580. As Chief Judge Alex Kozinski notes, “[L]iving means lying.” *United States v. Alvarez*, 638 F.3d 666, 674–75 (9th Cir. 2011) (Kozinski, C.J., concurring).

Saints may always tell the truth, but for mortals living means lying. We lie to protect our privacy (“No, I don’t live around here”); to avoid hurt feelings (“Friday is my study night”); to make others feel better (“Gee you’ve gotten skinny”); to avoid recriminations (“I only lost \$10 at poker”); to prevent grief (“The doc says you’re getting better”); to maintain domestic tranquility (“She’s just . . . a friend”); to avoid social stigma (“I just haven’t met the right woman”); for career advancement (“I’m sooo lucky to have a smart boss like you”); to avoid being lonely (“I love opera”); to eliminate a rival (“He has a boyfriend”); to achieve an objective (“But I love you so much”); to defeat an objective (“I’m allergic to latex”); to make an exit (“It’s not you, it’s me”); to delay the inevitable (“The check is in the mail”); to communicate displeasure (“There’s nothing wrong”); to get someone off your back (“I’ll call you about

len Valor Act differs in significant respects from false and misleading consumer speech, fraudulent speech, and defamation, for example—categories of speech that do not receive First Amendment protection.¹⁸² Lies under the Stolen Valor Act are not false and misleading commercial speech, for example, because they are not intended to make a profit.¹⁸³ Likewise, lies criminalized by the Stolen Valor Act are not necessarily fraudulent because the Act does not require a person to act in reliance on the lie or for the lie to cause individual harm.¹⁸⁴ And unlike defamation, false statements covered under the Act need not be targeted nor must they have caused individualized harm to another person.¹⁸⁵ Instead, the Stolen Valor Act broadly criminalizes all lies about military decorations without first establishing individualized harm.¹⁸⁶ Because of these distinctions, lies the Stolen Valor Act prohibits are not analogous to and thus are not included in one of the well-defined and

lunch"); to escape a nudnik ("My mother's on the other line"); to namedrop ("We go way back"); to set up a surprise party ("I need help moving the piano"); to buy time ("I'm on my way"); to keep up appearances ("We're not talking divorce"); to avoid taking out the trash ("My back hurts"); to duck an obligation ("I've got a headache"); to maintain a public image ("I go to church every Sunday"); to make a point ("Ich bin ein Berliner"); to save face ("I had too much to drink"); to humor ("Correct as usual, King Friday"); to avoid embarrassment ("That wasn't me"); to curry favor ("I've read all your books"); to get a clerkship ("You're the greatest living jurist"); to save a dollar ("I gave at the office"); or to maintain innocence ("There are eight tiny reindeer on the rooftop").

Alvarez, 638 F.3d 666, 674–75.

¹⁸² See 18 U.S.C. § 704 (2006); *State of Wash. ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691, 697 (Wash. 1998); BLACK'S LAW DICTIONARY, *supra* note 96, at 731.

¹⁸³ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). The regulation of false and misleading commercial speech has been justified because (1) consumers are not in a position to discriminate between false and true commercial speech, (2) the truth and falsity of commercial speech is objective and well suited for verification, and (3) commercial speech is considered particularly resilient to regulation, and thus there is less of a concern for chilling speech. See *id.* False and deceptive advertisements distort the marketplace of ideas and may be less likely than non-commercial speech to be corrected by the marketplace of ideas. See *id.*

¹⁸⁴ See 18 U.S.C. § 704 (2006); BLACK'S LAW DICTIONARY, *supra* note 96, at 731. If Strandlof lied to steal money from the veterans group, it would be fraud; there is no need for a separate statute preventing people from using false claims of valor to prevent fraud. Felisa Cardona, *Stolen Valor Act Unconstitutional, Federal Judge Rules*, DENVER POST, July 17, 2010, at A1.

¹⁸⁵ *119 Vote No! Committee*, 957 P.2d at 697.

¹⁸⁶ See 18 U.S.C. § 704.

narrow categories of speech that receives less First Amendment protection.¹⁸⁷

Furthermore, false statements regarding military decorations do not fit into one of the narrow categories of speech lacking First Amendment protection because lies can be important parts of speech.¹⁸⁸ The First Amendment reflects the belief that the government must not be able to restrict speech simply because it determines that some speech is not worthwhile.¹⁸⁹ Society must tolerate the expression of unpopular ideas or topics.¹⁹⁰ In a democracy, citizens should be prepared to challenge what they hear and to engage in vigorous public debate.¹⁹¹ Public discourse must not be at the mercy of the government acting as “the truth police.”¹⁹² Allowing the government, or even a jury, to decide what is true and what is false and permitting speech restrictions on that basis would prevent free expression and the marketplace of ideas from flourishing.¹⁹³

In addition, a new category of unprotected speech should not be created to cover the speech regulated by the Stolen Valor Act.¹⁹⁴ The Supreme Court has refused to carve out categorical exceptions to First Amendment protection in several notable cases and should continue to do so in the Stolen Valor Act.¹⁹⁵ The Supreme Court has recently refused to carve out categorical First Amendment exceptions for animal cruelty, protests at military funerals, and violent video games.¹⁹⁶ Although animal cruelty, protests at funerals, and violent videogames, like lies about military decorations, are repugnant types of speech, the First

¹⁸⁷ See *Stevens*, 130 S. Ct. at 1585.

¹⁸⁸ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270–71 (1964).

¹⁸⁹ See *Stevens*, 130 S. Ct. at 1585. The Court wrote:

The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

Id.

¹⁹⁰ *Id.*

¹⁹¹ See *id.*

¹⁹² *Alvarez*, 638 F.3d at 674 (Kozinski, C.J., concurring).

¹⁹³ See *Gertz*, 418 U.S. at 339–40.

¹⁹⁴ See *Stevens*, 130 S. Ct. at 1585.

¹⁹⁵ See *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2734 (2011); *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 n.3 (2011); *Stevens*, 130 S. Ct. at 1585.

¹⁹⁶ See *Brown*, 131 S. Ct. at 2734; *Snyder*, 131 S. Ct. at 1215 n.3; *Stevens*, 130 S. Ct. at 1585.

Amendment reflects a belief that loathsome speech must be tolerated to protect freedom of speech and to encourage full and vigorous debate.¹⁹⁷

New categories of unprotected speech should only be created in the most extreme circumstances.¹⁹⁸ For example, in 1982 in *New York v. Ferber*, the Supreme Court created a new category of unprotected speech for child pornography because the market for child pornography was intrinsically related to the underlying child abuse; the distribution of material depicting sex acts with children was thought to promote the performance of such acts.¹⁹⁹ Thus, the creation of a new category of unprotected speech was necessary because the creation of child pornography is inextricably linked to the act of harming children.²⁰⁰ Lies prohibited by the Stolen Valor Act, in contrast, do not cause any physical harm or abuse and thus do not rise to the level of the child pornography in *Ferber*.²⁰¹ Accordingly, creating a new category of unprotected speech for falsely claiming receipt of military decorations is unjustified.²⁰²

B. *Section 704(b) of the Stolen Valor Act Is a Content-Based Speech Restriction and, Therefore, Is Subject to Strict Scrutiny*

Section 704(b) of the Stolen Valor Act is a content-based speech restriction because the government specifically regulates false speech about military honors.²⁰³ The government, in other words, singles out certain liars for criminal punishment based on the content of their lies: those that lie about military decorations may be criminally sanctioned,

¹⁹⁷ See *Brown*, 131 S. Ct. at 2734; *Snyder*, 131 S. Ct. at 1215 n.3; *Stevens*, 130 S. Ct. at 1585.

¹⁹⁸ See *New York v. Ferber*, 458 U.S. 747, 759 (2003).

¹⁹⁹ See *Ferber*, 458 U.S. at 749, 759. Completely digital child pornography that does not involve any real children is constitutionally protected under the First Amendment. *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 250, 256 (2002).

²⁰⁰ See *Ferber*, 458 U.S. at 759–60. Child pornography does not lack protection because it lacks value; a central tenant of the First Amendment is that the government may not restrict expression simply because society finds the content offensive or disagreeable. *Texas v. Johnson*, 491 U.S. 397, 414 (1989); see also *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55–56 (1988); *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

²⁰¹ See 458 U.S. at 759.

²⁰² See *Stevens*, 130 S. Ct. at 1586.

²⁰³ See 18 U.S.C. § 704 (2006); *Carey v. Brown*, 447 U.S. 455, 461 (1980); CHEMERINSKY, *supra* note 102, at 934.

but those that lie about other topics may not be.²⁰⁴ For example, a lie about saving thousands of lives as a brain surgeon would go unpunished, but a similar lie about saving lives in war and becoming a decorated military veteran might not.²⁰⁵

Whether a statement is protected under the First Amendment is not subject to an ad hoc balancing of the relative social costs and benefits of the speech.²⁰⁶ Instead the First Amendment presumptively protects all speech, including false statements.²⁰⁷ Granted, and as the U.S. Court of Appeals for the Ninth Circuit recognized in *United States v. Alvarez* in 2010, there is very little value to false claims of military decorations.²⁰⁸ But the majority in *Alvarez* was concerned about setting a precedent for government regulation of speech simply because it is a lie.²⁰⁹ This concern is valid, particularly because upholding the Stolen Valor Act would permit content-based speech regulation and allow the government to make judgments about which topics to restrict.²¹⁰

The government must not decide what speech is particularly intolerable and proscribe it on that ground.²¹¹ The First Amendment, does not tolerate government regulation that hinges on content-based discrimination.²¹² Therefore, courts must apply strict scrutiny and prevent government regulation of stolen valor lies; otherwise, there is little stopping the government from criminalizing other types of lies, such as lying about age on a first date, about financial status on Facebook, or about drinking, smoking, or sex in a conversation with a parent.²¹³ It is

²⁰⁴ See 18 U.S.C. § 704; *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387 (1992) (stating that the concern with content-based discrimination is that the government will drive certain ideas or viewpoints from the marketplace).

²⁰⁵ See *R.A.V.*, 505 U.S. at 387.

²⁰⁶ See *Stevens*, 130 S. Ct. at 1585 (explaining that such a balancing test would be “startling and dangerous”).

²⁰⁷ See *Alvarez*, 617 F.3d at 1205 (“The right to speak and write whatever one chooses—including, to some degree, worthless, offensive and demonstrable untruths—without cowering in fear of a powerful government is, in our view, an essential component of the protection afforded by the First Amendment.”).

²⁰⁸ See *id.* at 1217 (“We have no doubt that society would be better off if Mr. Alvarez would stop spreading worthless, ridiculous and offensive untruths.”).

²⁰⁹ See *id.* at 1200.

²¹⁰ See *id.*

²¹¹ See *Snyder*, 131 S. Ct. at 1219; *Stevens*, 130 S. Ct. at 1585.

²¹² See *Snyder*, 131 S. Ct. at 1219; *Johnson*, 491 U.S. at 414.

²¹³ See *Alvarez*, 617 F.3d at 1200.

[I]f the Act is constitutional under the analysis proffered by Judge Bybee, then there would be no constitutional bar to criminalizing lying about one's height, weight, age, or financial status on Match.com or Facebook, or falsely representing to one's mother that one does not smoke, drink alcoholic bev-

a dangerous precedent to allow the government to decide that certain lies are particularly troublesome and thus to ban them from public discourse.²¹⁴

Content-based speech restrictions are presumptively invalid, unless the speech falls into a narrow and well-defined category of unprotected speech.²¹⁵ Moreover, the government has the burden of rebutting the presumption of unconstitutionality.²¹⁶ As discussed in Section A, § 704(b) of the Stolen Valor Act does not fit into any category of false factual speech that is outside of First Amendment protection.²¹⁷ Therefore, the government must meet strict scrutiny to restrict this speech.²¹⁸ And, as will be discussed in Section C, this section of the Stolen Valor Act does not meet strict scrutiny because it is not narrowly tailored to meet a compelling government interest.²¹⁹

C. Strict Scrutiny Analysis: Government Interests in the Stolen Valor Act Do Not Warrant a Speech Restriction

This Section argues that the government interests protected by the Stolen Valor Act are symbolic and, at most, prevent a generalized public harm.²²⁰ These interests are not sufficient to satisfy strict scrutiny and justify a restriction of First Amendment freedoms.²²¹ Furthermore, any harm associated with lies about military decorations can be addressed effectively by government counterspeech publicizing true medal recipients.²²²

erages, is a virgin, or has not exceeded the speed limit while driving on the freeway.

Id.

²¹⁴ See *Stevens*, 130 S. Ct. at 1585.

²¹⁵ *Chaplinsky*, 315 U.S. at 571–72; see *Cohen v. California*, 403 U.S. 15, 25 (1971) (“We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.”).

²¹⁶ *Stevens*, 130 S. Ct. at 1580; *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 817 (2000).

²¹⁷ *Alvarez*, 617 F.3d at 1200.

²¹⁸ *United States v. Perelman (Perelman I)*, 737 F. Supp. 2d 1221, 1238 (D. Nev. 2010), *aff’d*, 658 F.3d 1134 (9th Cir. 2011). Under strict scrutiny, the most stringent form of judicial review, the court will determine whether the restriction on a fundamental right is necessary to the furtherance of a compelling state interest and narrowly tailored to serve that interest. Haggerty, *supra* note 15, at 1126.

²¹⁹ See *Alvarez*, 617 F.3d at 1200.

²²⁰ See *infra* notes 223–230 and accompanying text.

²²¹ See *infra* notes 231–249 and accompanying text.

²²² See *infra* notes 250–262 and accompanying text.

1. Symbolic Government Interests Do Not Justify Restricting First Amendment Freedoms

Symbolic interests are not sufficient to justify a restriction of First Amendment rights.²²³ In 1989 in *Texas v. Johnson*, the Supreme Court invalidated statutes enforced in forty-eight states that prohibited flag desecration.²²⁴ In *Johnson*, the State of Texas argued that there is a compelling state interest in preserving the American flag as a symbol of national unity and, additionally, that statutes prohibiting flag desecration prevent breaches of the peace.²²⁵ The Supreme Court in *Johnson* rejected both of the government's arguments and invalidated the state statutes.²²⁶ The Court held that symbolic interests, such as the government interest in maintaining the American flag as a symbol of national unity, are not sufficient to justify a restriction of First Amendment freedoms.²²⁷

Like statutes prohibiting flag burning, the Stolen Valor Act seeks to protect the dignity and sanctity of a government symbol against people who, according to the government, desecrate or misuse that symbol.²²⁸ Through the Stolen Valor Act, the government also seeks to maintain the honor associated with military service medals.²²⁹ This interest in preserving the message or meaning associated with a government symbol, however, is insufficient to justify a restriction of First Amendment rights.²³⁰

2. No Individual Is Harmed by Lies Regarding Military Decorations

The First Amendment precludes punishment for generalized public frauds, deceptions, and defamation.²³¹ Said differently, the First Amendment does not allow the regulation of false speech simply on the grounds that it poses a general threat of harm to a group of individuals.²³² Consequently, the government generally does not regulate false speech unless there is a showing of individualized harm, as in the def-

²²³ *Johnson*, 491 U.S. at 401; Appellant's Opening Brief, *supra* note 6, at 22.

²²⁴ *Johnson*, 491 U.S. at 406.

²²⁵ *Id.* at 400.

²²⁶ *See id.* at 406.

²²⁷ *See id.*

²²⁸ *See id.* at 400; *Alvarez*, 617 F.3d at 1216.

²²⁹ Government's Answering Brief, *supra* note 18, at 6.

²³⁰ *See Johnson*, 491 U.S. at 405–06; Appellant's Opening Brief, *supra* note 6, at 22.

²³¹ Fried, *supra* note 75, at 238.

²³² Lidsky, *supra* note 71, at 1091–92.

amation or fraud contexts.²³³ The law, in other words, does not punish liars simply for lying, but instead relies on the marketplace of ideas for the truth to come to light and the liar to suffer public disapproval and loss of trust.²³⁴

Holocaust denial is an example of a type of speech that harms a general class of citizens but not one individual in particular.²³⁵ Because it only inflicts generalized harm, there is no law prohibiting Holocaust denial in the United States.²³⁶ Though there has not been a Supreme Court case on the issue, prosecutions for Holocaust denial would likely violate the First Amendment.²³⁷

Unlike speech that causes generalized harm, speech that causes demonstrable harm to a particular individual can be limited without running afoul of the Constitution.²³⁸ For example, defamation law allows plaintiffs to recover monetary damages in a civil suit in order to protect an individual property interest in reputation.²³⁹

Like Holocaust denial and unlike defamation, there are no particular plaintiffs harmed by the lies covered under the Stolen Valor Act.²⁴⁰ Instead, the harm is a generalized harm to the honor of the government and all veterans who have received honors.²⁴¹ In addition, and unlike in a defamation case, there is no individual plaintiff or identifi-

²³³ See *Stevens*, 130 S. Ct. at 1584; *Stolen Valor*, N.J.L.J., Oct. 18, 2010, at 22. (“Aside from the Stolen Valor Act, we as a nation have been content to allow our disgraced, non perjuring liars to suffer their public and private humiliation outside of prison, so long as no individual is harmed; if someone is swindled or otherwise injured by deliberate false statements of fact, a host of civil and criminal penalties await the scoundrel who uttered them.”).

²³⁴ *Stolen Valor*, *supra* note 233, at 286. Even objectively verifiable lies are not regulated, such as the number of arrests or whether a cafeteria was barricaded in *N.Y. Times*. See 376 U.S. at 257–58.

²³⁵ See Lidsky, *supra* note 71, at 1091–92.

²³⁶ See *id.* Unlike the United States, several European countries have laws prohibiting Holocaust denial. See *id.*

²³⁷ See Varat, *supra* note 69, at 1116–20.

²³⁸ BLACK’S LAW DICTIONARY, *supra* note 96, at 479–80.

²³⁹ Appellant’s Opening Brief, *supra* note 6, at 14 (“[The] exception [of defamation] . . . [is] justified chiefly by the desire to prevent injury to a specific person’s reputation.”); see *Rickert v. State Pub. Disclosure Comm’n*, 168 P.3d 826, 829–30 n.7 (Wash. 2007). A defamation plaintiff can recover for defamatory falsehoods about a private individual regarding a matter of public concern if the defamatory statement is negligently made and cause actual reputational harm or if they are made with knowledge of their falsity or reckless disregard for the truth. *Gertz*, 418 U.S. at 348–49.

²⁴⁰ See *Gertz*, 418 U.S. at 323, 341.

²⁴¹ See *Alvarez*, 617 F.3d at 1216.

able victim in a criminal prosecution under the Stolen Valor Act.²⁴² Instead, the criminal prosecution proceeds in the name of the government and the general public; there is no private right of action for individual veterans who claim they were harmed by a person's lie about military decorations.²⁴³ Therefore, because there is a difference between civil defamation suits, which seek to remedy private harm, and the Stolen Valor Act, which punishes a speaker for causing generalized, public harm, § 704(b) of the Stolen Valor Act is unconstitutional.²⁴⁴

Certainly, lying about military service is a particularly egregious lie, but it may not have the dire impact on the honor of military decorations as the government suggested in *Alvarez*.²⁴⁵ First, service people's heroism in combat is not motivated simply by the hopes of receiving military decorations.²⁴⁶ Service people are motivated by loftier goals, such as a duty to serve their country and fellow service people.²⁴⁷ Regardless of the severity of even the generalized harm, whether the lies regarding military decorations cause any particularized harm to individual veterans honored by military decorations is questionable.²⁴⁸

In sum, the Stolen Valor Act is designed to prevent a generalized, public harm, the government interests in the Act are symbolic, and therefore do not justify a restriction of First Amendment freedoms.²⁴⁹

3. Effective Counterspeech Could Address the Government's Concerns About Stolen Valor

Another reason the harm from lies covered under § 704(b) of the Stolen Valor Act is not sufficient to meet strict scrutiny is because there

²⁴² See *id.* at 1200; United States v. Strandlof, No. 09-cr-00497-REB, 2010 WL 4235395, at *1 (D. Colo. July 16, 2010); *Perelman I*, 737 F. Supp. 2d at 1238.

²⁴³ See *Alvarez*, 617 F.3d at 1200; *Strandlof*, 2010 WL 4235395, at *1; *Perelman I*, 737 F. Supp. 2d at 1238.

²⁴⁴ Fried, *supra* note 75, at 238 (distinguishing defamation from political campaigns where "the grossest misstatements, deceptions, and defamations are immune from legal sanction unless individuals are harmed"). "Group libels" have been recognized in some cases where there is proof that a particular member of a group is the subject of a defamatory statement. See *Weatherhead v. Globe Int'l, Inc.*, 832 F.2d 1226, 1228 (10th Cir. 1987). This is inapplicable here because a particular member of the group is not the subject of a defamatory statement. *Id.*; see *Strandlof*, 2010 WL 4235395, at *6–7 n.7.

²⁴⁵ See 617 F.3d at 1219.

²⁴⁶ *Strandlof*, 2010 WL 4235395, at *5 ("To suggest that the battlefield heroism of our servicemen and women is motivated in any way, let alone in a compelling way, by considerations of whether a medal may be awarded simply defies my comprehension.").

²⁴⁷ See *id.*

²⁴⁸ *Alvarez*, 617 F.3d at 1200 (comparing lies about military decorations to lying on dating websites).

²⁴⁹ *Strandlof*, 2010 WL 4235395, at *4.

are ample ways for the government to engage in effective counter-speech, especially by publicizing the names of true award recipients.²⁵⁰

In a democracy and in the marketplace of ideas, it is the public's prerogative to question what they hear, and the best remedy for false speech is counterspeech.²⁵¹ This is one reason false commercial speech falls outside First Amendment protection—consumers are not in a good position to determine the truth about advertised products.²⁵² There is an imbalance of power between the consumer and the advertiser.²⁵³ Likewise, one of the key considerations in a defamation suit is whether the plaintiff is a public figure.²⁵⁴ It is more difficult for public figures to recover for defamation-based harms because they are better able than the average nonpublic individual to engage in effective counterspeech.²⁵⁵

An imbalance of power similar to that in false commercial speech or defamation of a nonpublic figure does not exist between the person who lies about military decorations and the public.²⁵⁶ Members of the general public are fit to discriminate between liars and truly decorated veterans by educating themselves on who has and who has not received particular military decorations.²⁵⁷ For instance, the United States has created websites where the general public can access a database of Congressional Medal of Honor recipients.²⁵⁸ In addition, online groups have organized to track down and publicize names of people who have falsely claimed to be decorated veterans of the military.²⁵⁹ Similar web-

²⁵⁰ See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (stating that the appropriate “remedy to be applied” to objectionable speech “is more speech, not enforced silence”).

²⁵¹ See *id.*; see also *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (“[E]very person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.”).

²⁵² See *Whitney*, 274 U.S. at 377.

²⁵³ See *id.*

²⁵⁴ See *Gertz*, 418 U.S. at 344; *N.Y. Times*, 376 U.S. at 256.

²⁵⁵ *Gertz*, 418 U.S. at 344.

²⁵⁶ See, e.g., *The Epidemic of Military Imposters—Are These Individuals Heroes or Villains?*, POW NETWORK, <http://www.pownetwork.org/phonies/phonies.htm> (last visited Mar. 12, 2012) [hereinafter *The Epidemic of Military Imposters*] (including pictures posted for people to identify imposters); *Recipients*, CONG. MEDAL OF HONOR SOC'Y, <http://www.cmohs.org/recipient-archive.php> (last visited Mar. 12, 2012).

²⁵⁷ *Strandlof*, 2010 WL 4235395, at *6; see, e.g., *Whitney*, 274 U.S. at 377 (Brandeis, J., concurring); *The Epidemic of Military Imposters*, *supra* note 256; *Recipients*, *supra* note 256. As the old saying goes, “Believe nothing of what you hear, and only half of what you see.” THE OXFORD DICTIONARY OF PROVERBS 17 (Jennifer Speake ed., 2009).

²⁵⁸ See *Recipients*, *supra* note 256.

²⁵⁹ See, e.g., *The Epidemic of Military Imposters*, *supra* note 256; *Recipients*, *supra* note 256. Note that it may be beneficial for the public to know who has stolen valor so they can be

sites should be set up for all of the military decorations covered by the Stolen Valor Act.²⁶⁰

Online databases are effective and efficient ways to publicize the names of true medal recipients, alert the public to the issue of stolen valor, and provide an easy way for citizens to determine if people really received honors.²⁶¹ The existence of such databases also indicates that the marketplace of ideas already identifies and makes public the people who lie about receiving military decorations; thus, they are effective counterspeech.²⁶²

CONCLUSION

Categories of speech that fall outside of First Amendment protection must be narrowly defined to protect First Amendment freedoms. Section 704(b) of the Stolen Valor Act does not fit into any category of false factual speech that is unprotected by the First Amendment. This section of the Stolen Valor Act is a content-based speech restriction because the government seeks to regulate speech on a particular subject—false speech about military honors. Because the speech proscribed is not covered under any category of unprotected speech, a new category of unprotected speech should not be created, and because the law imposes content-based restrictions, the government must meet strict scrutiny in order for § 704(b) of the Stolen Valor Act to pass constitutional muster. The Stolen Valor Act does not meet strict scrutiny because it is not narrowly tailored to meet a compelling government interest. It is therefore unconstitutional.

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aware that the person is a liar and not trust other statements they may make. *See The Epidemic of Military Imposters*, *supra* note 256.

²⁶⁰ *See The Epidemic of Military Imposters*, *supra* note 256; *Recipients*, *supra* note 256.

²⁶¹ *See The Epidemic of Military Imposters*, *supra* note 256; *Recipients*, *supra* note 256.

²⁶² *See, e.g., The Epidemic of Military Imposters*, *supra* note 256; *Recipients*, *supra* note 256.